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TOO HARD: UNCONSTITUTIONAL CONDITIONS AND THE CHIMERA OF CONSTITUTIONAL CONSISTENCY

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The Provost of Harvard University, Albert Carnesale, has on his desk three boxes. One is marked "In." Another is marked "Out." And the third says, simply, "Too Hard."

The Provost, who ought to know about things being too hard,[1] is on to something. He has recognized that not all problems are soluble, that intractable quandaries are part of the human condition, and that only in the academic's perpetual fantasy is there necessarily an internally coherent and theoretically elegant answer to every question the world might throw at us. As Ronald Dworkin, contemporary legal theory's most prominent proponent of principles, recognizes, not everything is a matter of principle.[2]

The lesson of the sign on the Provost's third box is an important one for constitutionalists, and especially so for constitutional theorists. The sign on the third box is a challenge to a prevailing mode of constitutional scholarship, one that supposes that no problems are too hard for the theorist, even though they may have been too hard for all previous theorists. Under this mode of thinking, there is, theoretically, an approach, an analytical method, a theory, a standard, a principle, or a test that can be applied to any constitutional problem. This principle or approach may not be easily applied, but that is rarely the point.

Instead, the point is one of constitutional ontology—about the deep structure of constitutional issues and constitutional doctrine. Under what appears to be a common view of constitutional ontology, the correct solutions to constitutional problems are like scientific observations. Just as scientific observations are always explainable in theory, even if we have yet to discover that explanation, so too, according to a common view, are all correct constitutional out-

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1. As I write this, Carnesale is serving simultaneously as Provost, Dean of the Kennedy School of Government, and Acting President of Harvard University.

2. *See* RONALD DWORKIN, LAW'S EMPIRE 178-84 (1986) (discussing "checkerboard" laws) [hereinafter DWORKIN, EMPIRE]; RONALD DWORKIN, A MATTER OF PRINCIPLE 72-103 (1985) (discussing the distinction between policies and principles) [hereinafter DWORKIN, PRINCIPLE]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-28, 71-80, 90-100 (1977) (same) [hereinafter DWORKIN, SERIOUSLY].

comes in theory explainable by a constitutional doctrine that will generate them. Under this view, the development of constitutional doctrines and theories is ultimately a task of discovery.

Yet perhaps that is not so. Perhaps some constitutional problems are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government. And perhaps some constitutional problems appear intractable because we are looking for coherent principles and usable doctrines in areas of policy where questions of degree predominate, and where seemingly arbitrary lines are necessary to settle temporarily, but not to resolve in any deeper sense, intrinsically competing policy objectives. It is my claim that the problem of the doctrine of unconstitutional conditions is just such an intractable problem. Consequently, my goal here will not be to provide a theory to "solve" the problem of unconstitutional conditions, but instead to provide an account of why a solution is so unlikely to exist.[3]

In choosing this tack for addressing the problem of unconstitutional conditions, I not only depart from much of the conventional wisdom about the problem of unconstitutional conditions, but also depart from the conventional mode of constitutional scholarship. My goal is not to prescribe outcomes or tests to the courts, who appear to listen to such prescriptions far less than most constitutional scholars imagine. Instead, I will try to explain a phenomenon in a deliberately non-prescriptive way. If in doing so I am able, if only slightly, to help to achieve an increase in understanding, then that, far more than any unheeded prescription, will remain faithful to what I take to be the central features of the academic enterprise.

I.

The unconstitutional conditions doctrine has followed a predictable history, one that recurs in numerous corners of constitutional law. Consider first the question of the reach of the Free Speech Clause of the First Amendment. Per-

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3. The audience response to the oral presentation of this argument suggests that I would not go wrong in emphasizing at the outset that I do *not* claim that all or even most constitutional problems are doctrinally insoluble. I claim merely that some are, and that it is distinctly possible that the problem of unconstitutional conditions is one of these. Indeed, it would be something approaching miraculous were *all* of the issues that get grouped under some heading like "unconstitutional conditions" ones that could be resolved if only we could locate the correct rule, principle, or standard. Such a claim would involve placing enormous faith in the processes that have produced these problem-oriented groupings and headings, for the claim would be that these groupings invariably identify a closely related cluster of issues that could be doctrinally reconciled.

Yet if we think that these groupings may sometimes not track the doctrinally reconcilable state of the world, we must acknowledge that there is a non-empty set of constitutional problems for which no doctrinal solution may be available. I claim only that this is the case, and that the problem of unconstitutional conditions is likely a member of this non-empty set. In making this claim, however, I recognize that there might be strategic advantages in rejecting the notion of insoluble constitutional problems. Even if there are insoluble constitutional problems, it might be better to act as if there were not, for too easy recognition of constitutional insolubility might lead us to search with insufficient effort for those solutions that do exist. Acting as if there are solutions to all constitutional problems, even if there are not, may be a good strategy for maximizing the effort of looking for solutions. I reject this strategy here, but I do not dismiss its plausibility.

haps best characterized by the supposed absolutism of Justices Black and Douglas,[4] for a long time many constitutionalists adopted the "no law means no law"[5] approach to freedom of speech and freedom of the press. They rejected as disingenuous the view that there could be a category of "nonspeech,"[6] and widely subscribed to the position that the First Amendment, at the very least, covered the full range of behavior that could plausibly be described as "speech" in ordinary language.[7]

With such a capacious picture of the scope of the First Amendment in view, it should have come as no surprise that lawyers and scholars began to take advantage of what was seemingly encompassed by this all-inclusive picture. If the Free Speech Clause of the First Amendment permitted a First Amendment argument in all cases involving behavior that fell under the standard English meaning of "speech," then First Amendment challenges to, for example, the Securities Act of 1933 could no longer be considered frivolous.[8] And if, as a matter of deeper free speech theory, such challenges, including also hypothetical challenges to such prohibitions on verbal behavior as laws against price-fixing and consumer fraud, ought to be treated as frivolous,[9]

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4. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 143-44 (1959) (Black, J., dissenting); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Douglas, J., concurring); Roth v. United States, 354 U.S. 476 (1957) (Douglas & Black, JJ., concurring); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

5. *See* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law abridging' to mean no law abridging. . . ."); *see also* Black, *supra* note 4.

6. *E.g.*, Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 30 (1975); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 944 (1978).

7. There are (at least) two sides to the debate about the coverage of the First Amendment, but I will avoid rehashing themes I have written about extensively in the past. *See, e.g.*, Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285 [hereinafter Schauer, *Codifying*]; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

8. *See* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990).

9. As I think they should be. Consider in this context the fact that the registration provisions of the Securities Act of 1933, 15 U.S.C. § 77(a) (1994), requiring advance approval of a government agency (the Securities and Exchange Commission) prior to distributing written materials, and conditioning that approval on the government agency's determination that the materials are neither "incomplete" nor "inaccurate in any material respect," is a perfect example of what in other contexts would be called a plainly unconstitutional prior restraint. *See* Freedman v. Maryland, 380 U.S. 51 (1965).

I am unashamed of believing that a big part of the task of designing legal doctrine is one of designing the doctrine that will, in the hands of the likely array of appliers of that doctrine, produce the highest proportion of correct results, where the measure of "correctness" is supplied by the rationales or justifications lying behind the doctrine. So if the rationales for freedom of speech are, say, fostering democratic deliberation and allowing maximum freedom for individuals to communicate their opinions, then the best doctrine (which may at times be a crisp rule or set of rules, and may at times rely more on the less determinate norms that are sometimes called standards and sometimes called principles) is the one that, when applied by its actual appliers, will maximize the amount of democratic deliberation and maximize the freedom in fact of individuals to communicate their opinions. The existence of countervailing values will make this task even more difficult, but the point is only that there is nothing even remotely disingenuous or fishy about recognizing that legal doctrines must be designed with an eye to producing an optimal set of

then it turns out that the traditional "no law means no law—speech means speech" picture—has lost its value.[10] The cases that test the picture are ones that had traditionally been assumed not to be what we were talking about. Only when those assumptions were exposed and tested did it become clear that what we said we were talking about involved a large number of what might best be called *embedded exclusions*,[11] cases whose exclusion from the reach of the principle was a function not of explicit exclusion, but of an implicit assumption to the same effect.

This picture of the development of First Amendment thinking as increasingly recognizing the existence of these embedded exclusions is also an apt characterization of the progress of thinking about the doctrine of unconstitutional conditions, for here the problem of embedded exclusions is once more with us. As with free speech doctrine under the First Amendment, the slogans that have accompanied the doctrine of unconstitutional conditions have been wildly overinclusive, masking the embedded exclusions without which the doctrine would be totally unworkable. Indeed, the development of thinking about unconstitutional conditions tracks in time, as well as in structure, the parallel development in thinking about the reach of the First Amendment.

Starting in the 1960s, it became apparent to many people that Holmes's famous statement—"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[12]—was a mis-

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results whose optimality must necessarily be measured by a standard that comes from outside the doctrine itself.

Relatedly, it is possible that the strongest statement a court can make about the reach of a rule (including the reach of a constitutional doctrine) is in its opinion to ignore even the possibility that the rule is applicable to the facts presented. For example, in Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), the Supreme Court held that for Title VII sexual harassment purposes a complainant could establish the existence of a discriminatorily abusive work environment even without a showing of concrete psychological harm. *Id.* at 370-71. In *Harris*, most (but not all) of the conduct complained of was verbal, and the possibility of a First Amendment immunity for the harasser or the company for which he worked was raised both in the briefs and in oral argument. Yet in upholding the actionability of the facts alleged, Justice O'Connor's opinion made no mention whatsoever of the First Amendment, possibly a far stronger statement of its inapplicability than an explicit statement to the same effect.

Given that statements usually presuppose the plausibility of their negation, a corollary is that the strongest statement of the implausibility of the negation is to make no statement at all. *See* JOHN SEARLE, SPEECH ACTS 143-45 (1969). And that is why the non-statement in *Harris* is stronger than the statement "this is not a First Amendment case," which is in turn stronger than the statement "this is a First Amendment case, but the regulation is constitutional."

10. This is not to suggest that everyone, now or then, refused to recognize the impossibility of absolutism. Robert Bork noted early on that absolutism was only a "play on words." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971). Thomas Emerson's conclusory expression-action distinction at least had the virtue of recognizing the need for some device to allow the restriction of plainly restrictable speech. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17-20 (1970). Alexander Meiklejohn maintained his supposed absolutism only by moving all of the permissible restrictions out of the word "speech" and into the words "freedom of." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18 (1948).

11. There is a relationship between my idea of embedded exclusions and what William Van Alstyne has called the "irresistible counterexamples" of free speech theory. Van Alstyne, *supra* note 4, at 121.

12. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892). For a related Holmes opinion, see Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897) (relying on the "greater includes the lesser" argument that since Davis could have been

guided approach to the scope of constitutional protections of individual rights, especially in the post-New Deal era of large-scale governmental entitlements.[13] If criticizing the President of the United States, obviously protected by the First Amendment against direct criminal and civil liability,[14] could disqualify one from Social Security, Medicare, Medicaid, public housing, state, local, and federal government employment, veterans' benefits, state-supported higher education, use of public streets and parks, drivers' licenses, and so on ad infinitum, the effect would be massive. Not only are such disqualifications often more consequential than the sanctions that happen to be denominated as penalties—few people would rather lose their Social Security benefits or their government job than pay a $25 fine for a misdemeanor—but the actual effect would also be to diminish dramatically the number of people in fact willing to engage in criticism of public officials, an activity that is central to most conceptions of the underlying rationale for the First Amendment.[15]

As with the "no law means no law" rhetoric, the necessary rejection of Holmes's approach in *McAuliffe v. Mayor of New Bedford* was accompanied by extravagant statements regarding the breadth and strength of what came to be called the doctrine of unconstitutional conditions.[16] What the state cannot do directly it cannot do indirectly, it was said,[17] nor could the denial or withdrawal of governmental benefits be conditioned on relinquishing what would otherwise be constitutional rights. Merely designating governmental entitlements as privileges could not serve as the excuse for penalizing the exercise of what would otherwise be constitutionally protected liberties.[18]

Like the "no law means no law" rhetoric, this all sounded good in the 1960s and 1970s, when one of the primary tasks of the development of constitutional doctrine was to build barriers against what had recently been seen

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excluded entirely from the Boston Common, entry onto the Common could be conditioned on what might be with respect to private property a violation of the First Amendment). On this form of argument, and its relation to the issue of unconstitutional conditions, see Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U. L. REV. 227.

13. *See, e.g.*, Hans Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 83 HARV. L. REV. 1429 (1968); Charles A. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

14. I believe that there are certain doctrinal propositions so self-evident that no citation is needed. Law review editors, however, tend vehemently to disagree. Therefore, *see* Schacht v. United States, 398 U.S. 50 (1970); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Rankin v. McPherson, 483 U.S. 378 (1987) (Court divided on question whether public employee could be punished for applauding assassination attempt on President and not divided on question whether such speech was protected when uttered by a private citizen).

15. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see generally* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

16. *See* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The phrase itself has earlier roots. *See* Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

17. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

18. *See* Van Alstyne, *supra* note 13.

during the McCarthy era—the excesses of official bodies intent on stifling political opinion that took place outside of the center of the field. Yet, as with the "no law means no law" rhetoric, the 1960s and 1970s rhetoric of "the government cannot do indirectly what it cannot do directly" was poppycock if taken seriously. The blanket prohibition on indirect restrictions of constitutional rights also contained numerous embedded exclusions that the early development of the unconstitutional conditions doctrine made unnecessary to confront.

Cabinet officials might, as private citizens, say whatever they wished; however, no one doubted that people expressing constitutionally protected admiration for Stalin or Hitler would, for that reason, be excluded from consideration for cabinet appointments, and that a sitting cabinet officer could be instantly and constitutionally dismissed for engaging in the same behavior. Artists creating insipid pictures of little children with big eyes, or dogs playing poker, or dramatic images of Elvis Presley on black velvet backgrounds have obvious First Amendment rights to engage in those activities. But few would argue that such "art" would be equally entitled to federal funding or wall space at the National Gallery, or that the juries of the National Endowment for the Arts or the curators at the National Gallery would be acting unconstitutionally in drawing obvious content-based distinctions in deciding what to fund and what to hang.[19]

It was only when the existence of such embedded exclusions became apparent—a process later assisted by the opinions in *Rust v. Sullivan*[20]—that the problem of unconstitutional problems became a full-blown problem, rather than a useful slogan or a relatively uncontroversial corner of constitutional doctrine. For now it was clear that the problem was too hard, that there were pretheoretical intuitions (and practical realities) about permissible actions—firing the Secretary of State for joining the Communist Party—that could not be theoretically reconciled with pretheoretical intuitions about impermissible actions—evicting from public housing those who criticized the housing board.[21] For some of these examples, the slippery but useful idea of relevance was a satisfactory resolution.[22] If the imposed conditions were not relevant to

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19. In the discussion following the live presentation of this paper, several members of the audience suggested that I have raised a false problem by implying that a properly constituted unconstitutional conditions doctrine would have to treat such cases as lying outside the scope of the doctrine. Relying on what they take to be suggestions in, for example, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1994), they argued that the unconstitutional conditions doctrine does not necessarily render such actions unconstitutional, but only applies closer scrutiny. Thus, a properly crafted doctrine of unconstitutional conditions might very well include such cases, even though upon closer scrutiny, the particular outcomes might be sustained. I do not believe, however, that this approach gets us very far, since even heightened scrutiny for the kinds of cases I am thinking of would involve the courts in a much larger domain of supervision of administrative action than most existing understandings of judicial power would tolerate. Now, it is of course possible that these existing understandings are misguided, but it seems important to distinguish the question whether courts should be involved in a much larger range of issues than is now the case from the question whether within existing understandings of judicial power, the doctrine of unconstitutional conditions can do the work that its proponents expect of it.

20. 500 U.S. 173 (1991).

21. *See* Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966).

22. Thus, in Communications Ass'n v. Douds, 339 U.S. 382 (1950), Justice Frankfurter,

the particular entitlement at issue, the Constitution was more likely implicated than if the conditions went directly to the very nature of the task performed or the privilege granted.

This approach, too, however, has its limitations. It allows the state to evade, more easily than would be preferred, the premises underlying the unconstitutional conditions doctrine simply by redefining the nature of the activity. To take a hypothetical example based on the factors that plainly influenced Chief Justice Rehnquist in *Rust v. Sullivan*, public political utterances might be irrelevant to performance of a high school Spanish teacher, but if the subject is redefined as "Linguistic Competence in a Multicultural World" we can imagine public political utterances that might be thought relevant to hiring or retaining such a teacher in much the same way that public endorsement of astrology might be thought relevant to hiring or retaining a physics teacher.

Moreover, at times, a focus on relevance might make it too difficult for the state to pursue what are plainly legitimate policy goals. Just as veterans' preferences in civil service hiring demonstrate that it is not always necessary to tie (possibly) legitimate social goals to programs themselves premised on those goals,[23] so too can we imagine circumstances in which a requirement of relevance to a particular program might be excessively constraining. If, to continue the example, public denial of the desirability of veterans' preferences can be grounds for termination from a position as director of a state veterans' office or a state civil service bureau, is it so clear that it cannot be grounds for termination from a position as director of some other state agency, and, if so, then perhaps a less important position in some other state agency?[24] The limitations of a standard of "relevance" thus became increasingly apparent, and, as the problem of the unconstitutional conditions doctrine began to look even more difficult, the menu of proposed solutions became progressively longer.

Adopting the typical academic approach of identifying theoretically irreconcilable outcomes and announcing that existing doctrine was incoherent, theorists stumbled over each other in the race to identify the unifying and coherent approach.[25] Some saw the solution in the idea of coercion, others

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concurring, noted that "Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or exact freedoms *unrelated to the purpose of the facilities*." *Id.* at 415 (Frankfurter, J., concurring) (emphasis added). Cases employing something like the relevance standard include Roberts v. Lake Central Sch. Corp., 317 F. Supp. 63 (N.D. Ind. 1970); Watts v. Seward Sch. Bd., 454 P.2d 732 (Alaska 1969), *cert. denied*, 397 U.S. 921 (1970). *See generally Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

23. That is, the goals of a veterans' preference system are external to the goals of the civil service system. This distinction is of course artificial if we conceive of all such programs as part of a unitary category of "government action." But such conflation is unfaithful to the realities of political life. Different programs have different goals, and as long as this is so we can make sense of the idea of the goal of one program being appended to the operation of another.

24. The statement in the text implicates the kind of distinction between policymaking and non-policymaking positions that was at issue in patronage cases such as Rutan v. Republican Party, 497 U.S. 62 (1990), Branti v. Finkel, 445 U.S. 507 (1980), and Elrod v. Burns, 427 U.S. 347 (1976), but I take this distinction, tenuous at best, as an example of just the kind of problem that has inspired the urge to come up with a better theory.

25. Particularly noteworthy examples include Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); David Cole,

saw it in terms of a distinction between the public and the private, and still others thought they had found the found the key in the evaluation of the burdens placed on the exercise of existing constitutional rights. Some of the participants in this symposium have offered their own new attacks on the existing theories as incoherent, and have offered their own improvements on existing theories or their own totally new theories.

Yet for me the existence of embedded exclusions is often, as here, the signal that what some theorists see as "doctrinal disarray"[26] is premised on a particular point of view about what legal doctrine or legal theory should do. If, instead of assuming that there is a coherent doctrinal solution to be found, we recognize that the so-called problems with the unconstitutional conditions doctrine are but instantiations of the recurring tensions of constitutionalism, and of equally recurring problems in determining what courts (as opposed to other policymaking institutions) ought to do, we might be less critical of an existing approach that is short on elegance but perhaps long on wisdom, and we might as well be more inclined to redirect our energies away from recommending solutions that, because of the basic tensions of constitutionalism, are highly likely to remain futile.

II.

Consider for a moment the existing doctrine with respect to the Dormant Commerce Clause.[27] Under that doctrine, state prohibitions on non-state commercial activity that are designed to increase one state's competitive advantage over another state's violate the Constitution.[28] Moreover, state taxes structured to achieve the same effect suffer the same fate. So when Hawaii, in an effort to increase the competitive posture of Hawaiian pineapple wine and other indigenous alcoholic beverages,[29] imposed a tax on all alcoholic beverages except fruit wine and a brandy made from a shrub that was native to Hawaii,[30] the Supreme Court easily and unanimously invalidated the tax as just the kind of protectionism that lies at the core of the Dormant Commerce Clause.[31]

It is widely accepted, however, that had Hawaii, for exactly the same motive, provided a direct subsidy to the pineapple wine producers, the Dormant Commerce Clause would not have been implicated, even though under

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Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675 (1992); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Herz, *supra* note 12; Kreimer, *supra* note 19; Sullivan, *supra* note 17, at 1415; Symposium, *Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 175 (1989).

26. Sullivan, *supra* note 17, at 1417.

27. I recognize that a moment is just about long enough for most people.

28. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

29. The very identity of the product ought to make it apparent why the state of Hawaii was unwilling to rely on market forces to provide the requisite support for the industry.

30. There was much evidence that the fruit wine exemption was intended expressly to assist the pineapple wine industry.

31. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

many circumstances the economic effects would have been identical.[32] So it turns out that what might too easily be thought to be an unconstitutional motive—protectionism—is not unconstitutional in all cases, but only when that motive is implemented by only one out of several commercially and economically indistinguishable methods.

Let us shift now to a different issue, the question of government speech. If we look at the doctrine and theory of the First Amendment's prohibition on many forms of content discrimination, we see as a recurring theme a fear of government manipulation of what is commonly called "the marketplace of ideas."[33] Yet, when government chooses to enter that marketplace of ideas, with all of its resources and all of its aura of authority, and chooses to enter for the precise purpose of influencing the outcome, once again the Constitution is generally taken to be impotent.[34] Even though government entry into a public debate may at times be far more outcome-determinative than minor restrictions on the ways in which certain views can be expressed, the latter is generally unconstitutional and the former is almost always constitutionally permissible. Once again, therefore, constitutional power is marshalled against only a tenuously distinguishable subset of what is quite plausibly seen as a much larger problem.

Now consider a somewhat broader issue, one suggested by *DeShaney v. Winnebago County Department of Social Services*.[35] In *DeShaney*, the Supreme Court rejected the claim that state inaction in the face of non-state child abuse constituted a state deprivation of liberty without due process in violation of the Fourteenth Amendment. And although there might be plausible characterizations that could have led this particular case to be characterized as one involving state action, it was clear that the Court majority was motivated by its view that the Constitution could not plausibly be interpreted as a document intended to protect positive rights.[36]

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32. Although it is well-settled that protectionist taxes are unconstitutional and protectionist subsidies constitutional, there are questions at the borderline about whether a particular scheme is a tax or a subsidy. *See* West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994).

33. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

34. *See* Meese v. Keene, 481 U.S. 465 (1987); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983); Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237 (1978). There are many who wish the existing doctrine were different, however. *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); William Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1966).

35. 489 U.S. 189 (1989).

36. In his opinion for the majority, Chief Justice Rehnquist said that

> the [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. [Its] language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney, 489 U.S. at 195. On positive rights generally, see LAWRENCE CROCKER, POSITIVE LIBERTY: AN ESSAY IN NORMATIVE POLITICAL PHILOSOPHY (1980); JOEL FEINBERG, SOCIAL PHILOSOPHY 59-61, 94-96 (1973); Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIB-

Yet if the Constitution protects only negative rights—rights against but not rights to—the same problems arise. Under a regime in which the state is prohibited from denying rights but permitted to deny the conditions for their effective exercise, the state is permitted to do indirectly what it may not do directly, and cannot be required to do directly what it can be prohibited from doing indirectly.

If we think of many constitutional rights as being justified by their instrumental tendency to produce certain desirable end-states—frequent public discussion of public affairs, a nation without invidious distinctions drawn on the basis of race or gender, the existence of the nation as the relevant economic unit, and so on—then it turns out that the existing picture of constitutional government is one in which courts have no power to compel governments to take positive actions that might greatly improve progress towards the constitutionally desirable end-states, but in which courts do have the power to prohibit state actions the prohibition of which might tend much less towards the realization of the desired end-states.

Again, therefore, the constitutional understanding instantiated by *DeShaney* is one in which constitutional power may be directed against only a part of what might plausibly be seen as a larger and socially undistinguishable set.

The problem of subsidies under the Dormant Commerce Clause, of government speech under the First Amendment, and of state inaction under the Due Process Clause, therefore, all resemble the problem of unconstitutional conditions. Each of these four topics (and we could add more without excess difficulty) is one in which the problem to which the constitutional doctrine is aimed—protectionism, distortion of the marketplace of ideas, realization of certain desirable end-states, and indirect inhibition of constitutional rights—is far greater than could conceivably be expected to be within the plausible reach of judicial resolution. And because of that, all of these topics seem to present problems that are, in Al Carnesale's terminology, too hard.

But hardness is relative to the standards for success. If we are trying to discover or produce a test or a doctrine that simultaneously satisfies the constraints of theoretical elegance, usability by the courts, consistency with (more or less) existing understandings of the limits of judicial power, and production of roughly the correct results in most cases, then we are bound to be dissatisfied. But that is because there is little reason to believe that tests meeting this multiplicity of criteria are often to be found, or for that matter even should be found with any frequency. The reason why not, however, is broader than any of the particular issues within which it arises, and it is to that broader reason that I now turn.

ERTY 118 (1969); Gerald C. MacCallum Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967).

III.

Constitutionalism is in part a formal way of setting the antecedent rules of government. To oversimplify, setting the rules of play is one characterization of what is done by the original Articles of the Constitution, and also by amendments such as the Twenty-Second, limiting the Presidency to two terms, and the Twenty-Fifth, establishing the procedures for succession in the case of presidential disability. But constitutionalism is also a mechanism both for establishing and for enforcing certain side constraints on otherwise permissible governmental action, and on otherwise permissible policy optimization.[37]

Yet the broader these side constraints extend, and the deeper they cut, the more difficult it is to keep the side constraints separate from the very policies they are supposed to constrain. We think of side constraints as different from policies because we can make sense of an unconstrained policy. But if the constraint is so omnipresent that we cannot think of a policy without thinking of the constraint, then the notion of a side constraint may be hard to hold onto.

Consider one of the most debated side constraints in the literature of moral philosophy, the Kantian prohibition on lying. And consider as well three different variations on the same idea. One variation would prohibit lying and only lying, where "lying" is defined as knowingly making a literally false statement. A second variation would prohibit explicit lying and would also prohibit the making of misleading statements, even if those misleading statements are literally true. And a third variation would impose on a speaker an affirmative obligation to try to make the listener as fully aware of all relevant considerations as is the speaker.

Now it is well-known that a characteristic of the Kantian approach is that its strictures, including the prohibition on lying, apply unconditionally. What interests me here is the relation between the possibility of unconditional application and the scope of the stricture that is to be applied unconditionally. And if we look at the example of lying, it seems plausible to suppose that the possibility of never lying is greater than the possibility of never being misleading which is in turn greater than the possibility of never failing to provide the maximum amount of information. As any good woodworker knows, the narrower the cut, the deeper it can be on one pass of the saw. Conversely, the shallower the cut, the wider it can be made. So too with the prohibition on lying, where the plausibility of an unconditional prohibition increases with the narrowness of the scope of that prohibition.

If we now return from woodworking and Kantian ethics to American constitutional law, we can see the same phenomenon at work. Narrowly, it is well accepted that the stringency of a constitutional norm is likely inversely proportional to the scope of its application. An understanding of the operation

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37. On rights as side constraints, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-33 (1974); JUDITH J. THOMSON, THE REALM OF RIGHTS (1990); Judith J. Thomson, *Some Ruminations on Rights*, *in* RIGHTS, RESTITUTION, AND RISK: ESSAYS, IN MORAL THEORY 49 (William Parent ed., 1986). Dworkin's concept of rights as trumps is one I take to be structurally similar to Nozick's idea of side constraints. *See* DWORKIN, SERIOUSLY, *supra* note 2, at 188-93.

of the Equal Protection Clause that limits its application to intentional and explicit discrimination on account of race and gender,[38] for example, can be far more categorical in application than an understanding that applied its strictures to non-explicit and non-intentional discriminatory effects. And a First Amendment applicable only to, say, explicitly ideological communication could more plausibly be virtually absolute in strength than a First Amendment applicable to a much larger subset of the full set of human communication.[39]

With this as our perspective, consider now some of the examples I noted in the previous section. Take first the Dormant Commerce Clause. If the background purpose of the Dormant Commerce Clause is, not implausibly, to diminish economic competition among the states, then direct application of that background purpose—the rationale for the doctrine—would plainly be very broad, and, given relatively immovable constraints on the operation of judicial power, almost inevitably quite shallow. If the courts were empowered to examine all cases in which the states took actions tending towards economic Balkanization, we can scarcely imagine a scenario in which all such actions would be deemed per se, or even presumptively, unconstitutional.

Existing dormant commerce clause doctrine, therefore, which treats as presumptively unconstitutional only a much smaller subset of the set of actions tending towards economic Balkanization, can be seen as an admittedly artificial constriction of the anti-Balkanization background rationale in the service of increasing the plausibility of its stringency. Insofar as existing dormant commerce clause doctrine imposes a virtually absolute prohibition on statutorily explicit distinctions between in-state and out-of-state private businesses, while allowing numerous varieties of state promotion of local economic interests to remain untouched, the doctrine can be said to impose an economically and pragmatically artificial distinction. But insofar as that doctrine is seen as a judicially workable way of dealing with part, but not all, of a larger problem, then the existing approach looks to be somewhat more plausible.

Similarly, the distinction between (crudely) the unconstitutionality of government prohibitions on speech and the constitutionality of other government actions influencing the operation of the marketplace of ideas looks highly problematic if we are searching for a coherent, elegant, philosophically sound, doctrinally consistent, and pragmatically plausible distinction between the two. After all, virtually any government action has the potential for influencing the content and character of human communication. Indeed, if we try to come up with a "coherent" test distinguishing overt restrictions on speech from the universe of actions that might produce a restriction on speech, communication, or information, there is a considerable likelihood that we will see the principle of free speech implode before our eyes.

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38. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

39. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988); Schauer, *Codifying*, *supra* note 7.

But if instead we view the existing free speech principle, and its accompanying doctrines, as but an arbitrarily drawn subset of a larger set of concerns about communication and information policy,[40] we will be far less frustrated. And if we view the subset as being drawn not arbitrarily, but perhaps on the basis of principles of judicial power orthogonal to the central ideas that lead us to want to foster communication and the exchange of information, then we will be even less frustrated.

And consider as well the state action principle, or the public-private distinction, or the distinction between governmental acts and governmental omissions, in the same vein. Once more the distinction between acts and omissions, as *DeShaney* well shows, and as theorists like Cass Sunstein have emphasized,[41] is at first glance problematic. On numerous occasions the problem towards which a particular constitutional doctrine is addressed turns out to be much larger than the scope of that doctrine. A common response, and much of Sunstein's work is exemplary in this regard, is to focus in on the tenuousness of the distinction (as with the distinction between state action and private action) as a way of arguing that the scope of constitutional concern ought to be much greater than has traditionally been supposed.

Yet, once again, this attack collapses if we have a more realistic sense of the goal served by various constitutional distinctions. It could be that the substantive concerns of the Constitution are in many cases much broader than the subset of those concerns artificially carved out by doctrines such as the state action principle.[42] But it could also be that the subset is carved out just because of the idea, seemingly no less applicable to courts than to legislatures, that it is not always possible or desirable to deal with all of a problem or none of it. If, as cases like *Railway Express Agency v. New York*[43] and *Williamson v. Lee Optical Co.*[44] remind us, legislatures might be acting rationally in seeking to solve only some of a problem, then it is not so surprising to think that courts might be acting just as rationally in adopting the same approach.[45] And if it turns out that the lines drawn have something to do with the ease of exercise of judicial power, as perhaps in *DeShaney*, then the rationality of dealing with only a small part of a larger problem appears even less arbitrary.

IV.

Now let us take this perspective and apply it to the doctrine of unconstitutional conditions. The task of doing so is somewhat trickier than for some of the doctrines I have just described, since the unconstitutional conditions doc-

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40. *See* Lawrence A. Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319 (1983).

41. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

42. The argument I only allude to here is developed at greater length in Frederick Schauer, *Acts, Omissions, and Constitutionalism*, 105 ETHICS 916 (1995).

43. 336 U.S. 106 (1949).

44. 348 U.S. 483 (1955).

45. The best sustained defense of what I suggest here is Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

trine is not itself a substantive doctrine, but a metadoctrine applied to a number of different substantive doctrines, such as freedom of speech, freedom of religion, equal protection, and procedural due process. I will focus on freedom of speech, but I believe that what I say about freedom of speech applies, *mutatis mutandis*, to most of the various other applications of the unconstitutional conditions doctrine.

Consider two hypothetical cases of the kind ordinarily thought to create the so-called problem of unconstitutional conditions. One looks like *Pickering v. Board of Education*,[46] in that a teacher in the public schools is subject to punishment or dismissal for engaging in activity plainly protected by the First Amendment, yet while doing so on the teacher's own time and without the use of any public facilities. Indeed, we might imagine a hypothetical *Pickering* even purer than the real *Pickering* by imagining that our hypothetical *Pickering* did not publicly criticize the school board, as in the real case, but instead criticized the President of the United States or American foreign policy.[47] This now looks like a paradigmatic unconstitutional conditions case. If a modern day Holmes were to say that "the petitioner may have a constitutional right to criticize the President, but he has no constitutional right to be employed by the public schools," the argument would be quickly rejected, the unconstitutional conditions doctrine wheeled into service, the demise of the right-privilege distinction noted, and Pickering restored to his teaching position.

In itself, this case does not seem overly problematic, nor did it seem problematic when *Pickering* and similar cases generated, as noted above, a flurry of expansive statements about both the breadth and force of the doctrine of unconstitutional conditions. Yet the problems are revealed once we recognize the embedded exclusions within those expansive statements.

If, as the Supreme Court said in the real *Pickering*, the reasons for allowing public employees to criticize public officials track the reasons highlighted in *New York Times Co. v. Sullivan*[48] for allowing citizens to criticize public officials, then the progress toward the end-state of robust public debate is less when public officials hire employees who will agree with them than when they hire loud and squeaky wheels, less when government agencies fail to create internal affairs departments than when they do so, less when internal workplace newsletters are public relations documents than when their pages are open to all manner of criticism, less when public officials refuse to hold press conferences then when they do hold them, and less when public agencies

46. 391 U.S. 563 (1968).

47. What makes the latter case purer is that it removes the argument from insubordination. Although the argument that the school board was allowed to discipline insubordinate employees, even when the insubordination was manifested solely in verbal conduct, was rejected in *Pickering* itself, it has not been rejected in all public employee cases. When we are dealing not with teachers, but with soldiers, police officers, and firefighters, for example, courts have more frequently allowed punishment even when the insubordinate acts were solely linguistic and, at times, even when the insubordinate acts took place solely on the employee's own time and away from the workplace. *See* Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423. *Cf.* Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974).

48. 376 U.S. 254 (1964).

take a willingness to promote the agency as a condition for employment than when such a condition is not employed. Moreover, even though our hypothetical Pickering might not be dismissed for criticizing the President on his own time and without use of the facilities of his employment, we are loathe to reach the same conclusion for cabinet officials and indeed perhaps even for more senior officials of a board of education.

When faced with this kind of embedded exclusion,[49] the traditional approach has been to look for some kind of distinction that would reconcile the excluded and included cases.[50] Yet the idea I offer here is the possibility that, with respect to the kinds of problems grouped under the heading of "unconstitutional conditions," almost any new theory is destined to be unsatisfying. Sticking still to the *Pickering* rationale, consider all of the things that would produce, as *New York Times v. Sullivan* puts it, "robust" and "wide-open" debate on matters of public concern. We might start with a better-educated citizenry, move then to a better-informed citizenry, and then go on from there. Invariably we will discover that any formulation of the unconstitutional conditions doctrine will be unsatisfying for the same reason that the underlying doctrine, even when correct, is unsatisfying.

Most constitutional doctrines are instrumentally directed towards the production of certain end-states, yet the full arsenal of weapons that might bring us to those end-states is, in much of its armament, far beyond the plausible reach of judicial power. As a result, the doctrine of unconstitutional conditions is unsatisfying just because it is alluring. If we restrict ourselves to the belief that only direct prohibitions on the conduct protected by a constitutional right are within judicial purview, then we can deceive ourselves (as we have so successfully done for so many generations) into thinking that there is a closer relationship between prohibiting governmental restriction and reaching the desired end-state than there in fact is. But once we open Pandora's Box to the possibility that all sorts of government actions may less directly influence the degree of realization of the desired end-state, we are forced to confront the fact that no crisp or "coherent" principle distinguishes the judicially reviewable government actions that bear a causal relationship to the realization of the end-state from the non-judicially reviewable actions that bear just as much (and sometimes more) of a causal relationship to the realization of exactly the same end-state.

It is not my argument that there is something wrong with this state of affairs. Rather, it is my central point that we should not let the seeming arbitrariness of some of these distinctions lead us to believe that more is amiss

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49. One of my favorites, in this general area, is Justice Fortas's statement for the majority in Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969), that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." That the Court could not possibly have meant what it said was made clear (to some, too clear) in Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), and then again in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

50. The typical theorist offers a new standard or principle or theory, and the new theory generally reaches the same result as in all of the previous cases, with a few (usually about four) differences to show the novelty of the theory and the extent to which the new theory is more speech-protective than the Court's existing approach.

than there really is. "Doctrinal disarray" is the favorite rallying cry of those about to offer us a new theory (or, even worse, a new paradigm), but in numerous areas of policymaking it is far more acceptable to tolerate the idea of "about this much" or "a little of this and a little of that." In the non-judicial world, questions of degree are hardly self-evident signs of disarray, nor are they messy and inelegant compromises between competing concerns that are simply opposed to each other.

To this it might be responded, in the fashion of scholars as diverse in perspective as Ronald Dworkin,[51] Mary Ann Glendon,[52] and Robert Nagel,[53] that courts are simply not designed to deal with interests of more than two parties, that they are not structured to deal effectively with questions of degree, and that little about their style or culture is cut out to fashion compromises rather than declaring winners and losers. In the face of such structural differences between courts and other decisionmaking and policymaking institutions, there is a tendency to look for solutions appropriate to the tools we have, even if they are not appropriate to the problems we face. If you have a hammer, every problem looks like a nail.

Yet faced with the reality of the situation that many problems are simply larger and messier than can be dealt with by a coherent principle, or by courts operating in protypically judicial style, two approaches are plausible. One, an approach compatible with an expansive understanding of judicial power, would question the embedded exclusions, and try to take on quite a large segment of the problem. In many cases, there is nothing wrong with this, but then there should be no reason to suppose that a simple principle would emerge any more than we would suppose that one should emerge in the far messier world of legislative, executive, administrative, and political action. If, when confronted with the full magnitude of what is called the problem of unconstitutional conditions, we believe that courts ought to take on a much larger range than is now the case,[54] then we should not be surprised to find no greater internal coherence than we find for the approach that any other policymaking institution employs when it grapples with a very large problem that it finds under every rock it overturns.

Alternatively, we might, as I suggested above, imagine that we would just carve out of the larger problem one with which courts would be more capable of dealing. This approach would not label as doctrinal disarray the lack of an elegant principle distinguishing appropriate judicial intervention from appropriate judicial nonintervention, precisely for the same reason we should not excoriate as doctrinal disarray the tension between constitutional subsidies and unconstitutional taxes, the distinction between unconstitutional government restrictions on speech and constitutional government speech designed (often

51. DWORKIN, SERIOUSLY, *supra* note 2.

52. MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

53. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989); Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

54. Most of the existing "solutions" adopt some variant of this approach.

effectively) to achieve the exact same purpose, and the distinction between unconstitutional state actions and constitutional state inactions achieving the same end.

In each of these cases, the rationale behind the subset is, taken in one way, the same as the rationale behind the larger set. But there is often a rationale for having a subset, and in those situations, the rationale of "about this much" may be just about as good as we can or ought to get. It is obviously my claim that the doctrine of unconstitutional conditions is of the same variety, a patently artificial line between those cases in which, for theoretically unsatisfying reasons, it seems appropriate to have the courts police the indirect inhibition of constitutional rights, and those cases in which, for theoretically equally unsatisfying reasons, it seems appropriate not to have the courts police the indirect inhibition of constitutional rights.

Appearances to the contrary, it is not my purpose to suggest that intuitive, atheoretical, ad hoc, or hunchy approaches to the problem of unconstitutional conditions (or any other problem) are what ought to be adopted. Indeed, consistent with my self-described descriptive rather than prescriptive goal, it is not even my purpose to claim that the courts have been proceeding in an ad hoc fashion. Rather, it is my claim that the distinction between the cases in which the courts monitor the indirect restriction of constitutional rights and those in which the courts do not do so are neither explained nor reconciled by looking for theories of the particular rights involved, nor in looking for theories of the doctrine of unconstitutional conditions.

Instead, it is my claim that this distinction is likely from those perspectives to look more arbitrary and ad hoc than it, in fact, is. Only when we look in a different place, to an account of just "how much" judicial intervention in state policy is appropriate, and to what courts are good at and what they are not, might we come up with a better understanding of why intelligent people sitting on thoughtful deliberative bodies have produced a set of results that are easily—alas, far too easily—dismissed as a doctrinal disarray simply awaiting the enlightened guidance of the theorist for whom the problems of "how much" are neither interesting nor important.